UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FIVE

ASPLUNDH CONSTRUCTION CORP.

Employer-Petitioner

and **Case 5-UC-382**

THE INTERNATIONAL BROTHERHOOD of ELECTRICAL WORKERS LOCAL 126, AFL-CIO

Union

DECISION AND ORDER CLARIFYING BARGAINING UNIT IN PART AND DISMISSING PETITION IN PART

Asplundh Construction Corp., (herein Petitioner or Employer) filed the instant Unit Clarification petition under Section 102.61 (e) of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, and Section 101.17 of the Board's Statements of Procedures. The Petitioner seeks to exclude from the existing unit all employees who are employed by Utility Line Construction, Inc., (herein called Utility), and all employees of Asplundh Tree Expert Co. (herein called Asplundh Tree).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Based on my administrative investigation and the following facts, I will clarify the unit as requested to exclude unit employees employed by Utility, but dismiss the petition as to Asplundh Tree for the reasons set forth below.

I. BACKGROUND AND BARGAINING HISTORY

The Employer has recognized the International Brotherhood of Electrical Workers, Local 126, AFL-CIO (herein called the Union) as the exclusive bargaining representative of certain employees of the Employer, described in the current agreement as doing the work discussed in Article I of the agreement whose term is October 3, 1999 to September 29, 2002. This recognition occurred by virtue of a Letter of Assent executed by the Employer on July 3, 2001,[1] in which the Employer agreed in Article I that it would comply with the terms of the collective-bargaining agreement between the Union and Northeastern Line Construction Chapter, NECA, a multi-employer agreement dated October 25, 1999.[2]

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[1] Unless otherwise noted, all dates referred to herein are in 2001.
[2] This Agreement also provides for an exclusive hiring hall arrangement.

The Union contends that around November 20, it learned that an employer known as Utility Line Construction was performing certain work within the geographic jurisdiction of the Union, specifically in the State of Delaware. According to the Union, its investigation determined that some equipment used by Utility had the name "Utility" covering the name "Asplundh." Both parties agree that Utility is owned by Asplundh Tree, a closely held company which also owns the Employer.

By letter dated November 21, the Union informed the Employer that Utility might have an alter ego and/or joint employer relationship with the Employer. Further, the Union made a request for a substantial amount of information regarding this matter. The Union contended that the work performed by Utility at various locations in the State of Delaware should have been performed by the Employer's employees under the applicable terms and conditions described in the collective-bargaining agreement. By letter dated December 12, the Union made a second request for information, and on December 13, it filed a grievance alleging the Employer violated the terms of the contract with respect to work performed by Utility in the State of Delaware.

By letter dated December 19, the Employer partially responded to the Union's first information request. In a letter dated January 14, 2002, the Union made an additional information request in which it asserted that Employer, Utility, and Asplundh Tree are a single employer.

The Employer asserts that on October 1, 2000, Asplundh Subsidiary Holdings, Inc., the parent corporation, purchased a company called Shore Line Construction, Inc. and renamed it Utility Line Construction, Inc. Utility retained the employees of Shoreline Construction and continued to operate with approximately 65 employees who have traditionally not been represented by any union. The Employer contends the same chief executive officer who managed the business affairs of Shore Line Construction has remained in the same position with Utility. The Employer asserts there has been no commingling of employees between Utility and the Employer, and both companies report to officials of Asplundh Tree.

II. THE UNION'S MOTION TO DISMISS THE PETITION

The Union contends that the filing of a unit clarification petition is inappropriate and, therefore, the instant petition should be dismissed. In support of this contention, the Union argues that the Board does not regard a unit clarification petition as the appropriate vehicle for resolving work jurisdiction disputes between parties to a collective-bargaining agreement. According to the Union, the issue raised by the petition involved a work assignment dispute at an unspecified number of job sites in the State of Delaware where work is performed by employees employed by Utility. The Union bases its argument on its assertion that the Employer and Utility are wholly owned subsidiaries of Asplundh Tree and, thus, may be alter egos or joint employers. Since the alter ego or joint employer is performing work covered by the collective-bargaining agreement in the geographic jurisdiction of the Union (i.e. the state of Delaware), it argues this work by employees working for Utility should be performed by the Employer's employees under the terms of the agreement with the Union. The Union contends it is not seeking to represent the employees working for Utility. Rather, it is attempting to enforce the terms of its collective-

bargaining agreement. The Union admits this argument applies to all work performed by Utility within its geographic jurisdiction.

The Employer contends this matter is not simply a job site dispute, but rather a classic unit clarification issue. The Union is seeking all the work performed in its geographic jurisdiction by the newly acquired, commonly owned employer, Utility. Thus, the Employer asserts, where a union either seeks to represent the previously unrepresented employees of a commonly owned sister company or effectively seeks to represent them by acquiring the work that they perform, a unit clarification petition is the appropriate vehicle for resolving such representational issues. The Employer argues a separate unit is still appropriate even if single employer status is established.

Initially, I have decided to resolve the issue raised by this Petition based on the results of the administrative investigation without holding a hearing. *MCA Distributing Corp*., 288 NLRB 1173 (1988). The Board follows a restrictive policy regarding accretions to an existing unit, because such employees are not afforded a self-determination election. Furthermore, it is well-settled that the doctrine of accretion will not be applied where the employee group sought to be added to an established bargaining unit is so composed that it may separately constitute an appropriate unit, even where single employer status is established. *Hershey Foods Corp.,* 208 NLRB 452 (1974), enfd. 506 F2d 1052, (3rd Cir. 1984); *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976).

The Board has consistently held that a single facility unit, geographically separated from other facilities operated by the same employer, is presumptively appropriate even though a broader unit might also be appropriate. *Manor Healthcare,* 285 NLRB 224 (1987); *Passavant Retirement and Health Center*, 313 NLRB 1216 (1994). In determining whether the two groups of employees share a sufficient community of interest, the Board considers such factors as central control of labor relations policies, including the extent of local autonomy; control over daily operations; similarity of skills and working conditions; the extent of employee interchange; whether there is separate day to day supervision; and the extent of a separate history of bargaining. *Mercy Health Services,* 311 NLRB 367 (1993); *Compact Video Services,* 284 NLRB 117 (1987). Particularly important in this analysis is the existence of any employee interchange and whether there is any common day-to-day supervision. *Towne Ford Sales,* 270 NLRB 311 (1984); *Passavant Retirement, supra.*

Here, it is undisputed that the working conditions of the Employer's employees have been established through collective-bargaining, while terms and conditions of employment of the Utility employees have been set historically by Utility and its predecessor, Shore Line Construction. Similarly, there is no dispute between the parties that the day-to-day supervision is different for each group of employees. Also, the Union does not assert there is any evidence of employee interchange between the Employer and Utility. Although the Union contends it is not seeking to represent the employees of Utility, since the work sought by the Union through a grievance is work that is performed by Utility pursuant to contracts it obtained, the effective result of the grievance is to extend the Union's representation to employees employed by Utility.

In *Bethlehem Steel Corp.,* 329 NLRB 245 (1999), the Board held that a unit clarification petition is appropriate where "the employer's petition sought to clarify the unit placement of a 'new' classification that did not exist at this facility before the execution of the most recent contract…" Similarly, a unit certification petition is timely when the unit placement of the employees sought to be excluded by the employer's petition was not specifically addressed by the contract and the petition only sought to clarify the unit placement of relocated employees. *Bethlehem Steel Corp.,* 329 NLRB 241 (1999).

In support of its Motion to Dismiss the Petition, the Union relies on the Board Decision in *Coatings Application Co.,* 307 NLRB 806 (1992). *Coatings,* however, is distinguishable from the instant case, because in *Coatings* the Board determined a unit clarification petition was an inappropriate vehicle for resolving a dispute involving a specific job performed by a commonly owned sister company. Here, the Union is claiming all the work performed in its geographic jurisdiction by a newly acquired but historically nonunion company. Thus, the instant dispute involves a representational question, and I conclude it is appropriate to process the petition. Accordingly, I deny the Union's motion to dismiss the petition. *Commonwealth Gas Co.,* 218 NLRB 857 (1975); *AFG Industries,* 309 NLRB 307 (1992).

III. CONCLUSION

Based on the investigation of this petition, I find there is insufficient evidence to establish that a community of interest exists between the employees of the Employer and the employees of Utility. The evidence establishes there is separate day-to-day supervision, and there is no evidence of employee interchange between the employees of the Employer and the historically unrepresented employees of Utility. Under such circumstances, it is appropriate to exclude the employees of Utility from the unit of the Employer's employees represented by the Union. *Mercy Health Services; Compact Video Service; Safeway Stores, Inc.,* 256 NLRB 918 (1981). Factors especially militating against a finding of an accretion are the lack of employee interchange and the separate day-to-day supervision. See *Towne Ford Sales*; *Passavant Retirement Center*. Therefore, based on the above, I shall clarify the existing unit represented by the Union to exclude all employees employed by Utility Line Construction, Inc. As to Asplundh Tree, it is undisputed that Asplundh Tree has no employees performing construction work in the State of Delaware or within the geographic jurisdiction of the Union. In these circumstances I find it unnecessary to determine whether Asplundh Tree employees should be included or excluded from the unit. Accordingly, I shall dismiss the petition as to the employees of Asplundh Tree.

ORDER

IT IS HEREBY ORDERED that the Petition filed herein be, and hereby is, granted in part, and the employees employed by Utility Line Construction, Inc. are excluded from the bargaining unit. The Petition is dismissed insofar as it seeks to exclude employees of Asplundh Tree Expert Co.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by **April 19, 2002.**

Dated April 5, 2002
At Baltimore, Maryland

/s/ WAYNE R. GOLD
Regional Director, Region 5

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